AMERICAN STONE, INC.

IBLA 99-50 Decided July 27, 2000

Appeal from a decision of the Utah State Director, Bureau of Land Management, upholding a Notice of Noncompliance and Record of Noncompliance issued by the Salt Lake District Office. UTU-69243.

Affirmed in part; reversed in part.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mill Sites: Generally--Mining Claims: Surface Uses

BLM properly issued a notice of noncompliance under 43 C.F.R. § 3809.3-2(b)(2) requiring a millsite operator to remove junked vehicles, railroad ties, tires and other debris, to clean up fuel spills, to either rehabilitate or take down and remove dilapidated millsite structures and to file a plan of operations describing the measures to be taken to prevent unnecessary and undue degradation of the public lands.

APPEARANCES: Rosemary J. Beless, Esq., Salt Lake City, Utah, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

American Stone, Inc. has appealed a September 28, 1998, decision of the Utah State Director, Bureau of Land Management (BLM), upholding a Notice of Noncompliance and Record of Noncompliance issued by BLM's Salt Lake District Office for certain lands located in sec. 8, T. 1 S., R. 10 W., Salt Lake Base Meridian, Tooele County, Utah. 1/

1/ The area in question is referred to in the record as the "Aragonite Millsite" and the "Aragonite Millsite area." However, there are apparently three Aragonite millsites in sec. 8, T. 1 S., R. 10 W. They are the Aragonite M.S. #5 (UMC 252994), the Aragonite M.S. # 6 (UMC 252995), and the Aragonite M.S. #7 (UMC 252996). We are unable to determine from the record what particular claim or claims are involved in this case.

On October 21, 1991, BLM accepted a Reclamation Plan submitted by appellant for the "mill area" in response to an October 24, 1988, BLM notice that American Stone was in noncompliance for failure to file a notice or plan of operations. In its acceptance BLM stated that it would conduct regular inspections to ensure that the specifics of reclamation were completed within the stated time frames spanning a period of almost 4 years. BLM also rescinded the notice of noncompliance. However, reclamation never occurred.

The case record contains sporadic inspection reports from BLM describing conditions at the site, including one dated August 15, 1995, stating "[t]he general area of the millsite is a complete mess." However, BLM did not take any enforcement action against American Stone until July 31, 1997, when the Salt Lake District Office issued a decision imposing a notice of noncompliance for failure to reclaim the "Aragonite Millsite area." Therein, BLM stated that during a routine inspection on July 29, 1997, it determined that milling activities covered 12.94 acres of land which contained stockpiles of waste rock, ore, trash, and miscellaneous debris. It stated: "Under a reclamation plan submitted by you, and accepted by this office on October 21, 1991, you were required to reduce the size of your millsite to 5 acres by May 1, 1995. The subject millsites are located in T. 1 S., R. 10 W., Section 8, and are known as the Aragonite MS #5-7 (UMC 252994-252996)."

In the decision, BLM also noted that the millsite area was being used for storage of at least 500 railroad ties, old tires, crushed storage tanks, dilapidated trailers, box cars, junked vehicles, trash, wood, and aragonite ore. BLM observed that the mill was dilapidated, appeared to have been "idle and inoperable for many years," and that there was a diesel fuel leak from a storage tank and an oil spill covering an area of about 50 square feet. (July 31, 1997, Decision at 1.) BLM's decision instructed appellant to submit, within 30 days of receipt of the decision, a plan of operations describing reclamation measures designed to prevent unnecessary and undue degradation of the public lands. BLM enumerated the tasks to be accomplished, including trash removal, the restoration or the dismantling of the mill, and ripping, topsoiling, and revegetating the area. Also, BLM required appellant to furnish a bond to cover the costs of reclamation.

Appellant requested, and was granted, a 30-day extension to complete cleanup, to October 4, 1997. Thereafter, appellant requested, and was given two further extensions, the last an oral 2-week extension until November 6, 1997. "If the fuel & oil spills aren't cleaned up by Nov. 6, the Record of Noncompliance should be sent." (Short Note Transmittal to Case File, dated October 23, 1997.)

On November 18, 1997, BLM issued a decision establishing a "Record of Noncompliance." That decision recited that inspections from July 29 through November 12, 1997, revealed that reclamation had not been accomplished. BLM stated: "For failure to reclaim the Aragonite millsite and complete other requirements outlined in the Notice of Noncompliance,

you have established a Record of Noncompliance as of November 12, 1997." (November 18, 1997, Decision at 2.) BLM instructed appellant to file a plan of operations and a 100 percent reclamation bond "for all existing mining activity in excess of casual use conducted on BLM-administered lands nationwide." BLM indicated that the Utah State Director "will subsequently be determining the duration of your Record of Noncompliance." (November 18, 1997, Decision at 2.)

On December 11, 1997, appellant filed an appeal seeking State Director Review. Therein, it alleged that work to reclaim the area had been ongoing and it requested additional time to complete the reclamation work. Appellant detailed events at the site from 1969 to December 10, 1997. It alleged that in 1996 American Stone had leased "the Aragonite mine to Neil Jensen, DBA Western Minerals." He blamed much of the activities requiring reclamation to actions by Jensen. Appellant stated: "We are continuing to work at the mill to fully comply with your requirements, but we can only go as fast as the resources, that we have available to us."

In the September 28, 1998, decision before the Board on appeal, the Utah State Director briefly reviewed the record and determined that "the notice of noncompliance and the establishment of a record of noncompliance were appropriate."

In its appeal to this Board, appellant again asserts that Neil Jensen was responsible for causing site degradation and for failing to reclaim the site. Appellant further asserts that its own efforts to reclaim the site in 1997 were hampered by vandalism, and that BLM set unrealistic deadlines for reclamation. Appellant attached to its statement of reasons the affidavit of Lon Thomas, the president of American Stone, who stated:

> As of December 22, 1997, American Stone crews continued reclamation work at the Aragonite Millsite and all of the ground outside of the permitted five acres had soil spread across it, was scarified and seeded. The oil that was on the floor in the Quonset hut had been removed and the small fuel spill had been cleaned up. All contaminated material had been hauled to town and was properly disposed of. Several more loads of metal had been cut up and hauled to town and two additional loads of railroad ties had been hauled to town since December 10, 1997. American Stone did reclamation work to reduce the operating area to four acres, only three of which were on Bureau of Land Management land, and I assumed that we were again in compliance status with the Bureau of Land Management.

(Affidavit at 7.) He continued: "By the end of December, 1997 the Aragonite Millsite was fully recovered." Id.

Appellant asserts that because the site has been fully reclaimed and the reclamation bond is still in place the decision should be reversed and the record of noncompliance rescinded.

Appellant also requests a hearing before an administrative law judge to determine the facts in this matter. The Board will refer a case for a hearing in accordance with 43 C.F.R. § 4.415 only if the appeal presents an issue of material fact that cannot be resolved on the basis of a written case record, as supplemented by documents or affidavits submitted on appeal. Wold Trona Co., Inc., 150 IBLA 277, 281 (1999); Felix F. Vigil, 129 IBLA 345, 347 (1994). After our review of the record and the documents submitted on appeal, we conclude that the essential question regarding lack of reclamation can be resolved on the present record. Accordingly, the request for a hearing is denied.

[1] The Secretary of the Interior, as manager of the public lands, is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Section 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994); see Richard Oldham, 146 IBLA 220, 222 (1998) and cases there cited. The surface management regulations at 43 C.F.R. Subpart 3809 were promulgated to prevent unnecessary and undue degradation of lands by mining claimants. Differential Energy, Inc., 99 IBLA 225, 229 (1987).

In imposing the "record of noncompliance" BLM's November 18, 1997 decision relied on a regulation promulgated on February 28, 1997, 62 Fed. Reg. 9093, amending 43 C.F.R. § 3809.3-2 by revising paragraph (e) to provide for a "record of noncompliance" for an operator who has been served with a notice of noncompliance, whose response period has passed, and who has not taken actions required by the authorized officer. An operator with a record of noncompliance was required by that regulation to submit a plan of operations for existing and future operations and financial guarantees "for all existing disturbance for which said operators or mining claimants are responsible." In Northwest Mining Association v. Babbitt, 5 F. Supp.2d 9, 16 (D.D.C. 1998), the court invalidated the February 28, 1997, final rule. While the litigation was pending, the challenged rule was published and the old rules were removed from the C.F.R. In a final rule published on October 1, 1999 (64 Fed. Reg. 53218), the Department removed the judicially invalidated regulatory provisions and restored the regulatory provisions that were removed and/or replaced by that rule. Thus, there is no regulation in place providing for a "record of noncompliance," or for bonding of all existing disturbances nationwide, as imposed by the November 18, 1997, decision and upheld in the State Director's September 28, 1998, decision. Accordingly, we must reverse that part of the State Director's decision upholding the issuance of a "record of noncompliance," including the requirement for a 100 percent reclamation bond for all existing mining activity in excess of casual use operations nationwide.

However, other regulations contained in 43 C.F.R. Subpart 3809 were in force at the relevant time and support BLM's issuance of a notice of noncompliance. Specifically, 43 C.F.R. § 3809.1-1 requires "all operations [to] be reclaimed." In addition, "[o]perators conducting operations under an approved plan of operations who fails [sic] to follow the approved plan

of operations may be subject to a notice of noncompliance." 43 C.F.R. § 3809.3-2(b)(2). In particular, 43 C.F.R. § 3809.3-2(e) (as it existed before the February 28, 1997, rulemaking and again after the October 1, 1999 rulemaking) provides:

> (e) Failure of an operator to take necessary actions on a notice of noncompliance, may constitute justification for requiring the submission of a plan of operations under § 3809.1-5 of this title, and mandatory bonding for subsequent operations which would otherwise be conducted pursuant to a notice under § 3809.1-3 of this title.

The record in this case is replete with inspection reports and photographs documenting the degradation and misuse of the site in question. Though appellant asserted that the site was reclaimed as of December 1997, BLM inspection reports in the case record for May, June, and July 1998 indicate that, though progress had been made, reclamation was not complete.

Regardless of whether appellant sublet the site to Jensen, appellant remained, as it admits, the party responsible for reclamation of the site. Appellant's claims of vandalism cannot serve as a justification for failure to comply with authorized BLM directives and timely reclamation. As operator of the site, appellant was responsible for maintaining it in a safe and clean condition during any periods of nonoperation. 43 C.F.R. § 3809.3-7. Since appellant was given three extensions of time within which to accomplish the required work, the record does not bear out its claim that BLM's schedule for completion of the work was unrealistic. Moreover, as noted, despite appellant's claims of completion of reclamation, BLM inspection reports, including photographs, show that reclamation was not completed.

The burden of proof is on the appellant to show error in the decision appealed; if the appellant fails to demonstrate error, the decision will be affirmed. William Schweiss, 139 IBLA 10, 12-13 (1997), and cases there cited. In B.K. Lowndes, 113 IBLA 321, 325 (1990), we held that when a party appeals a BLM decision affirming a notice of noncompliance under 43 C.F.R. § 3809.3-2,

> it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). Where BLM determines that the surface disturbance caused by appellants' millsites had caused unnecessary or undue degradation of the lands, and appellants challenge that determination, the burden is on appellants to show that the situation does not exist.

In this case, appellant has not substantially disputed BLM's description of the area at the time it issued its July 31, 1997, decision imposing

the notice of noncompliance. Rather, appellant has offered various excuses for failing to take timely action. None of those reasons constitutes justification for failure to reclaim the site according to the schedule (as extended several times) set by BLM. Appellant has failed to show error in BLM's issuance of the notice of noncompliance.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Utah State Director's September 28, 1998, decision is affirmed to the extent that it upheld the notice of noncompliance and reversed to the extent it upheld the record of noncompliance. 2/

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

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2/ Appellant requested a stay of the Utah State Director's decision. That request is moot.